

## INTERNET & THE LAW

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# A New Roll of the Dice

*In an expanded enforcement approach against offshore gambling sites, the government targets American advertising and promotions agencies.*

BY BENJAMIN R. MULCAHY

**D**AVID CARRUTHERS, a resident of Costa Rica and England, was taken into custody this past July during a flight layover in Texas. His alleged crime? Being the CEO of BetonSports PLC, which operates BetonSports.com, an online gambling Web site based out of Costa Rica and Antigua. For that offense, a federal grand jury returned a 22-count indictment charging Mr. Carruthers, BetonSports PLC, and others with racketeering, conspiracy and fraud.

The BetonSports.com operation is legal where it is based, and at press time, BetonSports PLC still hadn't been duly served, forcing the United States to ask the court for more time to attempt service under the Hague Convention. But that didn't stop the U.S. Department of Justice from seeking to recover \$4.5 billion from the defendants and quickly obtaining a temporary restraining order effectively shutting down the BetonSports.com Web site, possibly forever.

And then, in a broadening attack on Internet gambling, on Sept. 7, New York law enforcement agents arrested the (now former) chairman of Sportingbet PLC, which operates ParadisePoker.com and various other Internet betting facilities out of London, at Kennedy International Airport (he had flown into New York from the UK) on a warrant issued by Louisiana for similar state law offenses, further rocking the foreign stock exchanges where many of the largest online gambling operations are traded.

The growth of the Internet has naturally led to an exponential proliferation of Web sites that are operated offshore but are accessible in the United States. Some of these offshore sites offer goods and services like online gambling that, while legal in much of the world, are clearly or arguably illegal here. The DOJ has targeted online gambling as a particular concern because, in the DOJ's view, it is difficult to prevent minors from gambling online, unscrupulous online gambling operations can manipulate the odds in their favor with less risk of detection, and online gambling businesses provide criminals and possibly terrorists with an easy and efficient vehicle for laundering money and perpetrating identity theft.

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If those online operations have no presence or assets in the United States, they may think that their lack of physical connection with this country will protect them. Indeed, it's natural to wonder whether the United States would have brought the case against Mr. Carruthers and the other defendants in the indicted group if it hadn't been able to take Mr. Carruthers into custody.

But the Justice Department had its eye on much more than Mr. Carruthers in this instance, with the indicted group including, among others, American advertising and promotions agencies that provided advertising and promotional services to BetonSports.com. By indicting the advertising and promotions agencies, the Justice Department has expanded its enforcement approach in these circumstances perhaps further than it ever has in the past.

For years, the Justice Department has taken the position that online gambling is illegal in the United States. The U.S. Attorneys' offices in several districts have successfully prosecuted offshore Internet gambling operations, and law enforcement will likely continue to pursue those types of cases. But as the attempts to duly serve BetonSports PLC illustrate, bringing those cases often involves first having to track down someone to sue and then, once they're found, having to fight costly and time-consuming jurisdictional disputes that law enforcement officials would prefer to avoid.

As a result, the DOJ has elected to pursue a path of what it perceives to be lesser resistance, going after American companies that provide services to offshore gambling sites (sometimes in addition to the sites themselves, sometimes in lieu of them) on the theory that the American companies are "aiding and abetting" the illegal operations.

Enforcement activity was initially directed at the major credit card companies that process the payments. Those actions resulted in major consumer credit and payment processing operators agreeing to block payment transactions related to online gambling.

Then enforcement turned against the newspapers, online search engines and radio and television networks that run ads for the gambling sites, asserting that American companies that advertise online gambling sites are aiding and abetting those illegal gambling operations. See Statement of John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, Nov. 20, 2002, [http://www.usdoj.gov/criminal/cybercrime/JGM\\_Intgambling.htm](http://www.usdoj.gov/criminal/cybercrime/JGM_Intgambling.htm).

With the BetonSports indictment, it now seems that the Justice Department is willing to target the advertising and promotions agencies (and their principals) that create campaigns for and drive traffic to the online gambling sites. The DOJ's campaign against the media industry forecasts what the advertising and promotions industry can expect.

### DOJ Position and Activity

In a letter sent in 2003 to the National Association of Broadcasters and other media trade groups, the DOJ asserted that "[w]ith very few exceptions limited to licensed sportsbook operations in Nevada, state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States, whether or not such operations are based offshore." See Department of Justice Letter dated June 11, 2003 to the National Association of Broadcasters.

In the same letter, the DOJ indicated that it considered ubiquitous ads for Internet gambling operations to be "troubling because [the sheer volume of advertisements] misleads the public in the United States into believing that such gambling is legal, when in fact, it is not."

In a thinly veiled threat that perhaps also provides some insight into how strong (or weak) the DOJ thinks its untested legal position is, the DOJ explained that it was sending its letter "as a public service" because it wanted the National Association of Broadcasters and all of its members to "be aware that the entities and individuals that accept and run such advertisements may be aiding and abetting these illegal activities."

The DOJ has reportedly issued dozens, perhaps hundreds, of subpoenas to various radio stations, television networks and magazine publishers that have run ads for online gambling sites, recently focusing on Esquire as a result of a "Gentlemen's Guide to Poker" feature in that magazine sponsored by BoDog Poker. But with all the bluster and subpoena activity surrounding advertising for online gambling, actual regulatory actions have been virtually non-existent, or at least not well-publicized.

In one instance that was made public, U.S. marshals seized a reported \$3.2 million in ad dollars from Discovery Communications, a television and media company that runs the Travel Channel. The money had been paid to Discovery as part of an ad buy by ParadisePoker.com, where people can play interactive poker for free or for a fee. Most of the major media companies, including broadcast and cable television

networks, Internet search engines, outdoor advertising companies and radio networks, now stay away from taking ads from online gambling sites out of fear that they will be charged with aiding and abetting the site being advertised.

### Aiding and Abetting Liability

Under existing statutory law and judicial precedent, aiding and abetting liability can be imposed on those who produce or run ads for illegal gambling operations if the party who produces, accepts and runs the ads knows the illegal nature of the site being advertised and provides substantial assistance or encouragement to the illegal gambling operation.

A quick review of the site being advertised should reveal whether it is legal or illegal in nature, and regulators have suggested that even just running the ads for, and accepting ad dollars from, the operator might constitute the “substantial assistance or encouragement” required to support aiding and abetting liability.

The risk associated with producing or running ads for sites that are legal in the United States—such as sites that use technology to prevent U.S. residents from playing or sites that offer alternatives that are legal in the U.S., such as poker tips, recreational gambling that does not require a wager, or sweepstakes—is relatively low because such activity is entitled to a level of protection under the First Amendment. But producing or accepting ads for pure online gambling operations that accept bets from the United States carries significant potential risk in the current regulatory environment.

### The Ads Aren’t Illegal—Yet

No federal criminal law expressly prohibits the advertising of an Internet gambling site or producing ads for the site. Not yet anyway, though the House passed a bill in the most recent session that sought to “clarify” the law in this area.

Even without the House “clarification,” however, several existing federal statutes do potentially apply to the underlying gambling operations themselves, including:

- (1) The Wire Act, often cited as making online gambling a federal offense;
- (2) the Illegal Gambling Business Under The Organized Crime Control Act, 18 U.S.C. §1955, which creates a federal offense based on violating state anti-gambling laws;
- (3) the so-called Travel Act, which makes it a federal crime to travel or use any facility in interstate or foreign commerce to carry on “unlawful activity,” defined as a business enterprise involving gambling “in violation of the laws of the State in which they are committed or of the United States;”
- (4) the Racketeer Influenced and Corrupt Organizations Act (RICO), which broadly stated makes it unlawful to participate in the conduct of an enterprise through a pattern of racketeering activity (which includes any act involving gambling) or a pattern of collecting unlawful debt;
- (5) the Unlawful Sports Gambling Act, which expressly prohibits advertising for sports gambling but it provides only for civil and not criminal penalties;
- (6) federal lottery statutes, which contain broad prohibitions on importing, shipping in interstate or foreign commerce, or using the U.S. mails for lottery material; and various state laws, with several states having either passed new laws specifically prohibiting online gambling or relying on pre-Internet era laws

broadly banning all types of gambling.

To the extent producing or running ads for a gambling operation isn’t expressly prohibited under the laws described above or other applicable laws, state and federal prosecutors nevertheless have a broad array of tools at their disposal in their fight against gambling, including “aiding and abetting” type laws that make it illegal to promote gambling or to induce or solicit people to gamble.

For instance, New York law provides: “When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.” See N.Y. (Penal) §20.00 (Consol. 2002); see also 18 U.S.C. §2 (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”).

These laws could be applied to prohibit producing promotions or advertising for Internet gambling, particularly if the promotion or advertisement is online

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Right of privacy claims arising out of an employer’s inspection of e-mail sent to or from a company e-mail account routinely fail if the company has a computer usage policy, of which the employee is aware, that informs employees that such e-mail, or indeed the company’s devices, are subject to monitoring by company personnel.

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and directly links viewers to the gambling Web site being promoted or advertised. Although an online or offline static advertisement that merely offers information but no link conceivably could pose less risk, an aggressive state prosecutor could still determine that such a commercial message induces people to gamble and is sufficient by itself to support aiding and abetting liability.

Aiding and abetting liability has historically been reserved for those who substantially assist or encourage, or directly benefit from, the underlying illegal enterprise with the knowledge of its illegal character. Thus, in *Emery v. Visa Int’l Serv. Ass’n*, 95 Cal. App. 4th 952 (2002), the court rejected aiding and abetting claims seeking to hold Visa responsible for losses that the plaintiff suffered when he purchased illegal foreign lottery tickets using his Visa card.

Addressing the plaintiff’s claim that Visa created an actual or ostensible agency relationship with the lottery operator by allowing the operator to exploit the Visa logo and use the Visa payment system, the court determined that Visa had no agency relationship with the foreign lotteries that allowed lottery tickets to be purchased with Visa cards, and Visa had no control over the preparation or distribution of the lotteries’ solicitations. Visa was a mere “conduit.”

But a recent ruling from the California Court of Appeal, *Shulz v. Neovi Data. Corp.*, 28 Cal. Rptr.3d 46

(2005), illustrates that it is possible to plead an aiding and abetting claim against companies that advertise or otherwise provide services to online gambling sites.

In *Shulz*, seeking to recover gambling losses and other damages, attorney fees, disgorgement of profits and injunctive relief, a purported class of plaintiffs brought an action under California Business and Professions Code §17200 against Ginix and other credit card payment billing and processing companies, claiming that they aided and abetted an illegal online gambling operation by processing credit card orders in connection with the scheme, allowing the underlying operator to use their logos and link directly to their payment processing Web sites, and receiving payment based on user activity, all while at the same time recognizing that the underlying site was an unlawful lottery.

The Superior Court granted the defendants’ demurrer and dismissed the claims, citing *Emery*. But the California Court of Appeal reversed as to defendant Ginix, holding that the complaint adequately pleaded facts satisfying the aiding and abetting elements of knowledge and substantial assistance or encouragement, emphasizing the direct link from the gambling site to the Ginix site to process credit card payments, the allegation that Ginix had analyzed the underlying Web site and recognized that it was an illegal lottery but went forward anyway because it generated substantial revenue, and the aura of respectability and encouragement that the Ginix service and logo lent to the underlying operation. Accordingly, the Court of Appeal remanded the cause of action against Ginix.

Unlike the *Emery* case, where the court emphasized that Visa should not be held liable because Visa had no agency relationship with the foreign lotteries that allowed lottery tickets to be purchased with Visa cards, and Visa had no control over the preparation or distribution of the lotteries’ solicitations, an advertising or promotions agency typically has a closer nexus with its clients. And that nexus is arguably even closer than usual if the agency has taken the assignment and structured some sort of incentive compensation arrangement.

In light of the current enforcement climate, it would be prudent for advertising and promotions agencies to bear in mind all potential civil and criminal liability before accepting an assignment for an online gambling operation. If an agency ultimately decides to accept the assignment, it should seek to minimize its exposure by evaluating the nature of the sites being advertised in an effort to ensure that they are legal under U.S. law, at least in part.

It should also probably avoid taking incentive compensation and, if it handles media buys, should consider adding provisions to its media orders that seek to absolve it from liability to the advertiser in the event any advance media payments are seized by authorities.

Finally, if its own operations are located outside of the United States, its principals may want to think twice about taking a flight that has a layover here.